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IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

DANIEL A. BUCKLIN,
Plaintiff in Error.
vs.
THE UNITED STATES,
Defendant in Error.

Case 15343.

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OCTOBER TERM, 1893.

Brief and Argument of Plaintiff in Error.

—BY—

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Brief and Argument of T. T. Taylor and Davidson & Williams, Counsel for Plaintiff in Error.

STATEMENT OF FACTS.

At the September term of the District Court, within and for the Second Division District of Kansas, the Plaintiff in Error, Daniel A. Bucklin, was indicted for violation of Section 5392 of the Revised Statutes of the

United States; with having committed perjury in certain testimony which had been taken by H. P. Wolcott, Register of the Land Office at Larned, Kansas, on the 26th day of February, 1892, in a contest proceeding between this Plaintiff in Error and one, M. A. P. Swacker, the prosecuting witness in this action.

There was indicted at the same time one, George Elder, and one, Thomas M. Bucklin; each charged in separate indictments with having committed perjury at the same time and place, and in the same proceeding; they being witnesses for the Plaintiff in Error, Daniel A. Bucklin in said contest proceeding.

Said cause coming on for trial at the March Term of said District Court, all three cases were tried together, and to the same jury. And the jury having heard all the testimony, the arguments of counsel, and being instructed by the Court, retired to consider their verdict, and after having been out deliberating upon their verdict for three days, came into Court for further instruction, and in open Court, and in the presence of the Plaintiff in Error and counsel, through their foreman, propounded to the Court the interrogatory: "Can we agree as to some of the defendants and disagree as to one?" To which the Court replied: "You can convict all of the defendants, or you can convict some and acquit some, but you cannot agree upon a verdict as to some, and disagree as to one or more."

Whereupon the jury again retired, and after having been out a few minutes only, returned into Court a verdict of not guilty as to Thomas M. Bucklin and George Elder, but a verdict of guilty against this Plaintiff in Error.

That afterwards, on the 13th day of March, and at the same term of said Court, the Plaintiff in Error filed

his motion to set aside the verdict and grant a new trial. Which motion was by the Court overruled.

That afterwards, on the 1st day of April, 1893, and at the same term of said Court, the Plaintiff in Error filed his motion in arrest of judgment, which motion was by the Court overruled.

Whereupon the Court rendered judgment upon said verdict and sentenced the Plaintiff in Error to the Kansas penitentiary, at Lansing, Kansas, for the period one and a half years from the first day of June, 1893, and that he pay a fine unto the United States of America in the sum of one hundred dollars.

That afterwards, to-wit: On the first day of June, 1893, the Plaintiff in Error procured to be settled and signed and filed in said cause, as a record in said Court, his bill of exceptions, leave having been given the Plaintiff in Error until the said 1st day of June, 1893, to have said bill of exceptions settled and signed.

That afterwards, to-wit: On the 16th day of May, 1893, the Plaintiff in Error presented to the Hon. John A. Williams, Judge of the United States District Court for the district of Kansas, Second Division, his petition for an appeal from said judgment to the United States Supreme Court, which appeal was afterwards, by said Hon. John A. Williams, Judge, allowed, as shown by the record herein.

(This is the same as Case No. 15,845, October term, 1895, which was brought to this Court on writ of error, the Plaintiff in Error not being satisfied that an appeal was the proper practice to have the case reviewed by this Honorable Court, brought said case on writ of error also.)

ASSIGNMENT OF ERRORS.

The Plaintiff in Error assigns as errors occurring at the trial of said cause, the following:

First:—That the Court erred in permitting the three cases, to-wit: The United States vs. Thomas M. Bucklin, The United States vs. George Elder, and The United States vs. Daniel A. Bucklin, to be consolidated and tried together to the same jury; each of said defendants having been separately indicted.

Second:—The Court erred in its reply to the question of the foreman of said jury which tried taid cause, when said jury, after having deliberated upon their verdict for three days, on the 11th day of March, 1893, came into Court, and the foreman asked the Court if the jury could agree as to some of the defendants and disagree as to one. To which question the court replied: "I think not. The jury can convict some of the defendants, or acquit some, or find all guilty or all not guilty, but they cannot find a verdict as to some and disagree as to one or more."

Third:—The Court erred in overruling Plaintiff in Error's motion for a new trial.

Fourth:—The Court erred in overruling Plaintiff in Error's motion in arrest of judgment.

Fifth:—The Court erred in rendering judgment of conviction in said cause against the Plaintiff in Error.

ARGUMENT.

In the bill of exceptions taken by the Plaintiff in Error in the Court below, and found upon page 34 of the record in this cause, will be found the instruction of the Court to the jury, in answer to a question propounded by the foreman of the jury; which is as follows: "Can we find a verdict as to some of the defendants and disagree as to others?" To which the Court answered and instructed the jury: "You can find a verdict of guilty as to all of the defendants, a verdict of not guilty as to all of them, or you can find a verdict of guilty as to some, and not guilty as to others, but you cannot find a verdict as to some and disagree as to one or more." To this instruction the Plaintiff in Error, as stated, excepted.

This instruction is in conflict with section 1036, chapter 18, of the United States statutes, and therefore erroneous. Said section 1036 reads as follows: "On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the othe defendants may be tried by another jury."

Except for this instruction the verdict of guilty against this Plaintiff in Error may never have been found.

The Court also erred in overruling Plaintiff in Error's motion for a new trial in this cause for the further reason that the verdict given in said cause was contrary to the weight of the evidence and the law of the case.

The indictment in this cause charges the Plaintiff in Error with committing perjury in certain testimony which he gave before H. P. Wolcott, Register of the

Land Office in a contest proceeding between himself and the prosecutrix in this cause, M. A. P. Swacker. Which testimony was written and introduced in evidence.

The indictment alleges that at said time and place, and in said testimony, the Plaintiff in Error testified to nine distinct material facts in said contest proceeding which were false, as follows, to-wit:

First:—That Margueriete A. P. Swacker, formerly Margueriete A. P. DeLangtry, failed to break or plow, or caused to be broken or plowed, five acres of land above described the first year of her entry.

Second;—That within the second year of her entry the said Margueriete A. P. DeLangtry, now Margueriete A. P. Swacker, failed to break or plow, or caused to be broken or plowed, five acres of the tract of land above described, and has failed to cultivate or otherwise five acres of said land above described.

Third:—That she failed to cultivate five acres of said land, and failed to plant trees, timber, seeds or cuttings the third year of her entry.

Fourth:—That she failed to plant timber, trees, seeds or cuttings on five acres of said land the fourth year of her entry.

Fifth:—That she failed to plant trees, seeds or cuttings on five acres of said land during the fifth year of her entry.

Sixth:—That she failed to plant the requisite number of trees, timber or cuttings, and to cultivate said tract of land the sixth year of her entry.

Seventh.—That no planting of trees, seeds or cuttings had been done on the land above described since 1889.

Eighth.—That she, the said Margueriete A. P.

Swacker, formerly Margueriete A. P. DeLagntry, had offered to sell or trade said tract of land above described.

Ninth.—That she abandoned said land prior to the 14th day of January, 1892.

Upon an examination of the testimony (Page 27 of the record.) as given before Mr. Wolcott, Register, by the Plaintiff in Error, and in which testimony the perjury is alleged to have been committed, we find that Daniel A. Bucklin, the Plaintiff in Error, gave no testimony before the Register as to the first, second, third, fourth, fifth, sixth and ninth allegations of perjury as laid in said indictment, but that the only two allegations of falsity set forth in said indictment about which the Plaintiff in Error did testify were the seventh and eighth. The seventh being that no preparation of the ground, or planting of trees, seeds or cuttings had been done on the land since 1889. The eighth being that the prosecutrix, M. A. P. Swacker, had offered to sell or trade said land.

We find in the testimony of Daniel A. Bucklin, before Mr. Wolcott, Register, as to the seventh allegation of falsity, when the question was propounded to him: "Has there been any additional planting of trees, seeds or cuttings since 1889, or has there been any cultivation of the trees planted in 1889, to the present time?" He answered, "There has not."

It will be observed that this question propounded by the Register of the Land Office, is a compound question, or two questions in one, and that the Plaintiff in Error makes the general answer, "There has not." He was right with reference to the fact that there was no planting of trees, seeds or cuttings since 1889. Because, we find in the testimony of the prosecutrix on page 30 of the record, in the sixth line from the top of

the page, she says: "We never planted any trees, or seeds, or cuttings, or timber seed upon said land since 1889." So that as to the seventh allegation of falsity in the indictment, the testimony of the prosecutrix, and the only testimony upon that point in the case, corroborates the statement made by the Plaintiff in Error at the office of the Land Register, and hence this allegation of perjury must fail because the statement was true. This leaves only the eighth allegation of falsity in the indictment, which is that the prosecutrix, Margueriete A. P. Swacker had offered to sell or trade said tract of land. The Plaintiff in Error testifies before H. P. Wolcott, Register of the Land Office (Page 27 of the record.) in answer to the question of the Register: "State what you know, if anything, of the Defendant holding and offering this place for sale?"

Answer: "She offered to sell me the place for $550.00."

Question: "What time was that?"

Answer: "Last February, 1891, the day before the Defendant left the house."

Upon an examination of the testimony in the trial below we find in the testimony of the prosecutrix (Page 30 of the record.) that she contradicts the Plaintiff in Error. She says, "I never abandoned the place, or offered to sell the place to any one."

An examination of the entire testimony in the case discloses the fact that this is the only testimony contradicting the Plaintiff in Error upon that point; or the only testimony as to the falsity of the statement. The testimony of the prosecutrix shows that she moved away from the place in 1891, moving to Furley, Sedgwick County, Kansas. That she left the place in charge of Thomas M. Bucklin. All the testimony

shows that after having left the place in 1891, she was not back there for the purpose of looking after it.

It is an elementary principle of law that a person cannot be convicted of perjury upon the uncorroborated testimony of one witness when oral testimony is exclusively relied upon.

U. S. vs. Wood, 14 Pet. 430.

Not only is the testimony as to the falsity of this statement that the prosecutrix had offered to sell Plaintiff in Error this place, the uncorroborated testimony of one witness, but all the circumstances corroborate the statement of the Plaintiff in Error. So that we say Plaintiff in Error having testified to only two of the allegations of falsity set out in the indictment; one of these being true, and the other denied by the uncorroborated statements of one witness; that the verdict in the case was against the weight of the evidence and the law in the case. Said motion for a new trial should have been sustained by reason of the fact that the jury after having received the instructions of the Court, and after having deliberated upon their verdict three days, and having brought in a verdict of not guilty as to two of the defendants, and guilty as to one, shows that it was simply a compromise verdict. Particularly does this appear when the verdict was returned so soon after receiving the instruction of the Court that they could not disagree as to one one of the defendants. We think the motion for a new trial ought to have been sustained by the Court below on the ground of newly discovered evidence.

An examination of that motion for a new trial supported by the affidavit and letter of Mrs. Swacker, on

pages 35 and 36 of the record, which was discovered after the trial of said cause, shows conclusively that the prosecutrix offered to sell said timber claim and strongly corroborated Plaintiff in Error in his testimony before H. P. Wolcott, Register, on the ninth allegation of perjury as laid in said indictment, proving his testimony on this point, that she had offered the claim to him for $550.00 to be true also.

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